

**(1997) 09 DEL CK 0081**  
**In the Delhi High Court**  
**Case No : IT Case No. 79 of 1995**

Bhagat Construction Co. (P) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

**Date of Decision :** 17-09-1997

**Acts Referred:**

**Citation :** (1998) 150 CTR 167 : (1998) 232 ITR 722 : (1998) 100 TAXMAN 605

**Hon'ble Judges :** R.C. Lahoti, J;J.K. Mehra, J

**Bench :** Division Bench

**Advocate :** Harihar Lal and Ms. Radha Rangaswamy, for the Appellant; Sanjeev Khanna, Ajay Jha and Ms. Premlata Bansal, for the Respondent

## **Judgement**

R.C. Lahoti, J.—By this application under s. 256(2) of the IT Act, 1961, the assessed seeks a mandamus commanding the Tribunal to draw up a statement of case and refer the following questions of law for the opinion of the High Court arising out of the order of the Tribunal relevant to the asst. yr. 1985-86 :

"1. Whether the Tribunal is right in holding that a perusal of the agreement makes, it abundantly clear that the assessed has not manufactured or supplied any intermediary products in the execution of civil engineering works and other works and whether in arriving at its finding the Tribunal has misread the evidence and the agreement between the assessed and the Bokaro steel unit ?

2. Whether the Tribunal is right in holding that all the works undertaken by the assessed under the agreement with Bokaro Steel, do not involve the activity of manufacturing any article or thing ?

3. Whether the Tribunal was right in holding that the assessed is not engaged in the activity of manufacturing of any intermediary products ?

4. Whether the finding of the Tribunal that the assessed is not engaged in the manufacturing of any intermediary products is based on evidence ?

5. Whether the Tribunal was right in holding that the equipment purchased and

installed during the asst. yr. 1985-86 has not been utilised for any activity of manufacturing any article or thing ?

6. Whether the finding of the Tribunal that the equipment purchased and installed during the assessment year has not been utilised for any activity of manufacturing any article or thing is based on evidence ?

7. Whether the finding of the Tribunal that the assessed is not engaged in the manufacture or processing of any intermediary products is arrived at by ignoring the relevant material on record and by relying upon extraneous of s. 32A of the Act ?

8. Whether the Tribunal is right in holding that the assessor's case is covered by the decision of the Supreme Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, and as such the assessed is not entitled to investment allowance ?"

The questions as framed by the assessed are varied and multifaceted but in substance they involve only one issue - whether, on the facts found by the Tribunal, the assessed can be said to be an industrial undertaking having invested in machinery or plant for the purposes of business of construction, manufacture or production of any article or thing ?

2. The relevant facts as culled out from the appellate order of the Tribunal may briefly be stated. The assessed is a private limited company. For the asst. yr. 1985-86, the assessed derived income from construction of the Bokaro steel plant. It was also doing contract work for the DDA. The nature of the work executed by the assessed was as under :

- (1) Earth work
- (2) Masonry work
- (3) Concrete work
- (4) Wood work
- (5) Flooring work
- (6) Finishing work
- (7) Miscellaneous items.

In this year the assessed had made investments of Rs. 5,402 and Rs. 81,959, respectively, on quarry equipment magazine and stabilizer (including accessories). The assessed claimed investment allowance under s. 32A of the IT Act, 1961, as under :

Quarry equipment magazine - Rs. 5,402 at 25% 1,350 Voltage stabilizer - Rs. 81,956 at 20% 20,448 ----- Total 21,830 -----

3. The Tribunal went into the facts of the case and found that the assessed had

not manufactured and supplied any intermediary products in the execution of civil engineering works and other works - the several activities carried on by the assessed referred to in paragraph 3 above. The assessed had executed earthwork, etc., to the tune of Rs. 3,48,30,055. The Tribunal concluded that the assessed was engaged in the execution of the civil engineering works and not manufacture of any intermediate products supplied to the principals. The assessed had also done wood work of a negligible amount of Rs. 55,625. All these works did not involve the activity of manufacturing of any article and thing. The assessed had explained to the Tribunal that the quarry equipment magazine was used for storage of explosives required for blasts in the quarry in order to extract stones. Stabilizer was explained by the assessed to be an equipment necessary to maintain the voltage of the current. The stability of power supply and voltage was required to be maintained to run the various equipment in the operations including extraction, crushing and mixing of concrete of suitable grades. Having formed an opinion that the assessed was not engaged in the manufacture of any intermediary products and the equipment was not utilised for any activity of manufacturing any article or thing, the Tribunal held that the assessed was not entitled to deduction under s. 32A of the Act. The Tribunal allowed the appeal preferred by the Revenue and disallowed the above said deduction.

The assessed moved an application under s. 256(1) of the Act seeking reference to the High Court on the above said questions which has been rejected by the Tribunal forming an opinion that no question of law warranting a reference to the High Court arose from the findings of fact recorded by the Tribunal.

4. Learned counsel for the petitioner - assessed has submitted that determination of the nature of activity carried on by the assessed-whether it was a manufacturing activity or not, required interpretation of the contract entered into by it with the DDA and interpretation of a document is a question of law. Reliance was also placed on a Division Bench decision of the Delhi High Court in Commissioner of Income Tax Vs. Univmine (P.) Ltd., wherein it has been held that mining of marble amounts to carrying on the business of production entitling the assessed to investment allowance under s. 32A. Learned counsel for the Revenue have submitted that the questions sought to be referred were fully covered by the decisions of the Supreme Court in CIT vs. N. C. Budharaja & Co. (supra) and the Delhi High Court in Commissioner of Income Tax, Delhi-I Vs. Minocha Brothers P. Ltd., , and in the light of the law so laid down the answers to the questions were obvious. Hence, no reference was called for.

5. Learned counsel for the Revenue have pointed out that on behalf of the assessee, written submissions were filed on 30th April, 1994, copy whereof is available on record as Annexure "C". there from the stand taken by the assessed by reference to s. 32A(2)(b)(iii) becomes very clear. Therein the assessed has described its activity. It is stated by the assessed :

"The assessed is an industrial company engaged in ground engineering, mining

and other contract works in the field of civil engineering, including precision work of providing and fixing in position jigs, fixtures, inserts, conduit pipes, etc. in the foundation of installing structure and also providing steel railings for the structure. The assessed undertakes the aforesaid jobs and other related jobs mainly on specific items. The major items of the contract of the assessed with the Bokaro Steel Plant authorities envisage processing, manufacturing and supplying of cement concrete, reinforced cement concrete and recast reinforced cement concrete of different grades and laying the same in the foundations on which steel structures and machinery are to come up. For doing the aforesaid jobs, the assessed had to drill holes with pressure-driven pneumatic drills for charging explosives to blast in quarries and mines for obtaining stone aggregates, for crushing and grading by crushers and mix them along with other materials like quarried sand, cement and water. All the materials are weighed in accordance with the specifications provided by the plant authorities and then mixed in the central batching plant. Our payment rates are based on the strength of concrete so produced. The concrete has to be processed and produced in accordance with certain grades/marks which provide the contents by weight so as to attain the proper strength. If the strength of concrete on testing falls below the mark, no payment is to be made to the assessed or remedial measures are to be carried out at the cost of the assessee."

Learned counsel for the Revenue has also invited attention of the Court to extracts from the contract entered into between the assessed and the DDA (at page 46 of the paper book). It is titled as a contract for "civil engineering works in cold rolling mills of Bokaro Steel Plant". The scope of work is stated as under :

The scope of contract under this work shall cover all civil engineering works (ss. I to VII as per the enclosed schedule of quantities) in respect of following units :

- (a) Tandem mill complex
- (b) Pickling line
- (c) H.R. Coil conveyer.

It was further submitted by learned counsel for the Revenue that whatever was extracted by the assessed even by mining operations, was utilised by him in finishing the civil engineering works which the assessed was carrying on and the completed work was handed over to the principals; it is not a case where the products of the mining work were the end-products of the assessor's activities. It was submitted that s. 32A was not at all attracted to the case of the assessee.

6. In the case of CIT vs. N. C. Budharaja & Co. (supra), the provisions of ss. 80HH, 84 and 32A of the IT Act, 1961, had come up for the consideration of their Lordships of the Supreme Court. The assessed had undertaken the work of construction of a dam. Their Lordships assumed that the work constituted an industrial undertaking. The question arising for decision was whether the assessed was manufacturing or producing articles. Their Lordships opined that a

dam is composed of several articles such as stones, concrete, cement, steel and other manufactured articles like gates, sluices, etc., but it cannot be said that the end-product, the dam, is an article. A dam is constructed; it is not manufactured or produced. The expression "manufacture" and "produce" are normally associated with movables - articles and goods, big and small-but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road or a building. If the construction of a dam, a bridge or a building as a whole does not amount to manufacture or production of an article, their Lordships have observed, it is difficult to see how the laying of a foundation or foundations for such dam, bridge or building can be categorised as manufacturing or production of articles. Whatever is utilised in such activity, ultimately becomes an integral part of the dam, bridge or building. The work is done on the spot and it is a works contract. It is no different from any other works contract which is done on the spot and becomes part and parcel of a larger construction. In such matters, one has to look to the precise activity and decide whether it can be said to be meant for manufacturing or producing an article.

7. In the case of *Minocha Brothers (P) Ltd.* (supra), the Division Bench of the Delhi High Court has laid down the test of end product for determining the nature of the activity of the assessee. The assessee-company was engaged in building work as a contractor and in the process of that work some manufacture had to be done like the manufacture of doors. It could not be said to result in the manufacture of goods but they were really part of the construction work. The doors, windows and bricks were all consumed by the assessed in making the building. Their Lordships held that the assessed could not be described as a manufacturer or processor in respect of those activities. Their Lordships have during the course of judgment referred to a decision of the Bombay High Court in *Commissioner of Income Tax Bombay City-I Vs. N.U.C. Private Ltd.*, where "industrial company" was interpreted to mean that it covers only construction of ships and not construction of anything else. It was also held that the making of doors and window frames, concrete beams and slabs was a step in the construction of a building. The business could not be divided into two parts (a) making of windows and doors and (b) construction. It was accordingly held that the assessed fell outside the definition of "industrial company".

It may be noted that in the course of arguments in that case, it had been argued that the percentage of profit from making windows, doors and slabs was greater than the income from the other business of construction. This contention was negatived. The Court held :

"Apart from the fact that there is nothing on record to show separately the income derived by the assessed from its so-called different activities, one of constructing buildings and the other of manufacturing frames and beams, we have already held that the assessee-company was not carrying on the said activity of manufacturing frames, etc., independently of, or otherwise than in the

process of, the construction of the buildings. It is not, Therefore, permissible to divide its activity into the said two segments to compare the income from one with the other. The assessee-company's only business is that of construction and repairing of buildings and there are no two activities carried on by it .....

8. In the case at hand the assessed might be extracting minerals such as stones by carrying out mining operations, but the product of such mining operations is not the article or thing in which the assessed is dealing. The minerals produced by the assessed are consumed by him in the process of civil engineering works which is the business activity of the assessee. It cannot, Therefore, be said that the assessed was an industrial undertaking for the purpose of producing the article or thing for which the machinery or plant was wholly used.

Reliance on the Delhi High Court's decision in the case of Univmine (P) Ltd. (supra) by the petitioner-assessee is misconceived, as in that case the assessed was carrying on the business of extracting and selling marbles and was held to be an industrial undertaking carrying on the business of production of an article. The case is distinguishable and does not apply to the case at hand.

9. In our opinion the main business of the assessed shall have to be determined. Whether it was a construction business and any step involved in that construction business was only ancillary to the construction activity of the assessed or production of any goods was itself the main business activity of the assessed ? An assessed may be engaged in the activity of building work as a contractor and in the process of completing that work some manufacture may be done at interim stages. The product of such manufacturing activity would not result in the production of goods but the product of such activity would be consumed by the assessed in its building work. In that case the assessed would be not a producer but a consumer; for at the end of its business activity, it would be producing not any goods or article but only constructing a building. The following statement of law in the case of Minocha Brothers (supra) is binding on us and we respectfully follow that the same :

"..... inasmuch as the assessed is a manufacturer of buildings or constructor of buildings, an intermediary stage should not be taken to convert the assessed into a manufacturer of goods. A transitory or evanescent product like an R.C.C. block or a door is only a step towards making the whole building. It would not be reasonable to say that the assessed is a manufacturer or processor of goods as understood in common parlance, in the context of the definition of "industrial company" given in the Finance Acts, 1969 and 1970."

10. We are, Therefore, of the opinion that no referable question of law arises on the findings arrived at by the Tribunal. The answers to the questions raised are obvious and covered by the decisions of the Supreme Court and the High Court of Delhi referred to hereinabove. The Tribunal did not err in rejecting the petitioner's application under s. 256(1) of the Act. The present petition is, Therefore, rejected though without any order as to the costs.